U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: July 9, 1998

Case No. 97-INA-524

In the Matter of:

UNITY SHOPPE, INC.,
Employer,

on behalf of

JOSE SIERRA,
Alien.

Appearance: S. J. Daly, Esq., of Santa Barbara, California, for Employer and Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that UNITY SHOPPE (Employer), filed on behalf of JOSE SIERRA (Alien), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On September 1, 1994, the Employer, a Non-Profit Relief Organization, filed for alien labor certification on behalf of the Alien to fill the position of "Storeroom Supervisor." AF 83. The job duties were described as follows:

> Order, pickup, inventory, sort, arrange and store donated and purchased food and non-food items. Maintain schedules of operation. Supervise 3-4 volunteers; interact with staff, donors, vendors and other agencies. Plan layout of stockroom and warehouse; maintain and organize delivery dock area for foodstuffs and other materials. Supervise maintenance of store and offices; supervise the set-up and tear-down of fixtures, tables and chairs for each event as directed. Must communicate with clients in Spanish.
>
> Person to contact about this position: Barbara Telefson, Director, UNITY Shop
> 1236 Chapala, St., Santa Barbara, CA 93101
> (805) 564-0013

AF 83-86.[2] On the basis of the Employer's description, the job offered was classified as "Stock Supervisor" under DOT Occupational Code No. 222.137.034.[3] The wage offered was $10.21 per hour from 11:00 AM to 8:00 PM, for a forty hour week. No education was required, but the Employer required two years in the Job Offered or two years of experience in the Related Occupation of Warehouse Manager. The Other Special Requirements were the following:

> Must speak Spanish (See attached statement)
> Must have valid Calif. drivers license (use organization's vehicle or pick-up)
> Refernces will be checked
> Two years of verifiable experience
> No moving violations on driving record within past two years
> No smoking during working hours
> If hired, must have legal right to work

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[2]This excerpt from the Appellate File is copied verbatim with no changes or corrections.

[3]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Id.[4] Although two U. S. workers applied for the job, neither of them was hired. AF 91-104.[5]

Notice of Findings. The Notice of Findings ("NOF") of October 15, 1996, cited 20 CFR § 656.3 and said Employer had failed to establish that it was operating an on-going business, and that it was offering a job that could provide permanent, full-time employment to which U. S. workers could be referred. Citing 20 CFR §§ 656.21(b)(2)(i)(A), 656.21(b)(2) (i)(b) and 656.21(b)(2)(ii), the NOF said the Employer's requirement of two years of experience supervising employees was unduly restrictive, as the Employer did not appear to have any employees to supervise. As Employer's job description stated a combination of the duties of stock supervisor and foreign language interpreter, this job requirement thus was an unduly restrictive violation of 20 CFR § 656.21(b)(2)(i)(c). Moreover, the job description appeared to violate 20 CFR § 656.21(b)(2)(ii) because it required the worker to perform duties that do not appear in any single DOT job description. The CO then described the rebuttal procedure for the Employer to follow and specified the evidence required to rebut the findings regarding the restrictive combination of duties. AF 77-81. The Employer was directed to provide evidence that it historically had employed workers to perform this combination of duties or that workers in the area of intended employment customarily performed this combination of duties, or that this combination of duties arose from business necessity.[6]

Rebuttal. On November 7 1996, the Employer's rebuttal addressed (1) the existence of a *bona fide* job providing permanent, full-time employment in an on-going business to which U. S. workers could be referred under 20 CFR § 656.3; and (2) whether the job description contained unduly restrictive hiring criteria in (a) its requirement of two years of experience supervising employees and (b) its combination of the duties of stock supervisor and interpreter in violation of 20 CFR §§ 656.21(b)(2)(i)(A), 656.21(b)(2)(i)(b), and 656.21(b)(2)(ii).

(1) Employer said it had a current job opening in that it maintained year 'round operation of a distribution center and central store to provide various forms of merchandise for needy people. To service this business and throughout the year the stock supervisor was required to order, pick up, take inventory, sort, and arrange the donated items. The Employer further asserted that the stock supervisor was required to "maintain work schedules of employees" and "coordinate the activities of volunteers," and "interact with clients, staff, employees, donors,

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[4]This excerpt from the Appellate File is copied verbatim with no changes or corrections.

[5]The Alien, who is a national of Mexico, completed his education in 1965. As his qualifying experience he said that he worked as a Warehouse Supervisor for a Clothing Manufacturer in Mexico from January 1987 to March 1989. He did not disclose his employment from March 1989 to the end of August 1991, but said he was a self-employed automobile mechanic from September 1991 to August 1994. AF 180-184.

[6]The Employer could remedy this defect by (1) revising its job description to eliminate the combination of duties and to retest the employment market, (2) by producing evidence that it normally and customarily employed workers to perform this combination of duties, or (3) by justifying its combination of these job duties on the basis of business necessity. **H. Stern Jewelers, Inc.**, 88 INA 421 (May 23, 1990).

vendors, and with other charitable non-profits agencies." The year 'round work of the stock supervisor also included planing, layout of stockroom and warehouse, and maintaining and organizing the delivery dock, it added. AF 14. These assertions were supported by income expense statements showing annualized charges relating to the existence of the entity Employer claimed to operate in the 1995-1996 year. The Employer said its year 'round enterprise was essentially the store it ran for resale of contributed merchandise to the needy persons who were its clientele. Presenting state and federal tax returns for the subject period, the Employer indicated that in addition to its full time Executive Director and a part time Director it also employed a number of people whose jobs and duties were unidentified. This category of evidence was limited to two consecutive quarterly periods in 1995-1996, however. In addition, as the CO later observed in the Final Determination, the Employer conceded that after 1994 its stock supervisor position was performed by various incumbents as a part time job.

(2) Employer said two years of experience were needed because the stock supervisor was required to supervise three full time and four part time workers and because of "the sensitive nature of the requirements." AF 16. Citing **Information Industries, Inc.**, 88 INA 082(Jan. 13, 1988)(*en banc*), Employer said experience was essential to the supervision of the workers performing various functions under the direction of the stock supervisor. Employer then discussed the appropriate level of Specific Vocational Preparation ("SVP") for this job. To support its requirement of two years' experience, the Employer argued that its position of a stock supervisor may be compared to such other charitable organization supervisory positions as "Coordinator, Volunteer Services" under DOT Occupational Code No. 187.167-022, "Commissary Manager" under DOT Occupational Code No. 185.167-010, "Manager, Distribution Warehouse" under DOT Occupational Code No. 185.167-018, and "Manager, Retail Store" under DOT Occupational Code No. 185.167-046.

To support the business necessity of the foreign language requirement, the Employer relied on business communications with customers, clients, volunteers, and employees, some of whom spoke only Spanish or limited English. Employer denied that there was a combination of the duties of a stock supervisor and an interpreter, comparing the duties of the Job Offered with those of an "Interpreter" under DOT Occupational Code No. 137.267-010. The Employer then argued that,"[I]n many instances the Supervisor is the only individual in the building who speaks both English and Spanish."

> Our job description does not suggest that the Supervisor will serve as a language liaison for this organization, or provide interpretation services between a Spanish-speaking client and an English-speaking employee as defined above. Rather, it means that the use of Spanish is needed to meet the requirements inherent in the position and in providing the charitable services of our organization to our clients, 75% of whom were Spanish speaking in 1975 according to our surveys and statistics.

The Employer then argued,

> There are only three instances when Spanish is used to perform the job of Supervisor: (1) as needed to assist the needy client; (2) as needed to communicate with the customer; and (3) as needed to supervise employees and volunteers. <u>There are no interpreter duties required in this position.</u>

AF 19. (Emphasis as in original.) The Employer concluded that it would be infeasible and impracticable for it to bear the expense of hiring an interpreter to perform a function that is only accessory to its business of distributing items to the underprivileged and that there was no such combination of duties in this job for this reason, citing **Robert L. Lippert Theatres**, 88 INA 433 (May 30, 1990)(*en banc*); **Gencorp**, 87 INA 659 (Jan. 13, 1988)(*en banc*).

Final Determination. Certification was denied in the Final Determination of December 10, 1996, in which the CO concluded that the Employer failed to sustain its burden of proving the existence of a job opening and the business necessity of fluency in Spanish for the stock supervisor. First, the CO explained that because the Employer had been able to operate with a part-time stock supervisor, the greater weight of evidence indicated that this actually is a part-time position and that a part-time position is not eligible for alien labor certification under the Act and regulations. As to the foreign language requirement, the CO concluded,

> Your rebuttal indicates that historically the person filling this position helped staff communicate with Spanish-speaking clients, meaning that the position **did** serve as a liaison between staff and clients. There is a non-compliant combination of duties here. The foreign language liaison requirement is a preference for your convenience and [is] tailored to the alien but [is] not based in business necessity.

AF 12. (Emphasis as in the original.)

Appeal. On January 13, 1997, the Employer filed a request for review by BALCA, to which it attached a brief. Although it addressed the CO's subordinate and conclusory findings in the Final Determination, the appeal essentially restated the Employer's rebuttal arguments.[7] **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*). The brief, which was signed by the Executive Director, contained assertions of fact that were inconsistent with some facts that she alleged in her rebuttal statement. As these restated facts were offered as new evidence in the appeal, they have been disregarded by the Panel in its review of the Appellate File. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992). Also, the Panel will not consider the Employers arguments in rebuttal of the Final Determination. **Huron Aviation**, 88 INA 431 (Jul. 27, 1989); and see **Modular Container Systems, Inc.**, 89 INA 228 (Jul. 16, 1998)(*en banc*).

Discussion

[7] In referring to page six of her Rebuttal statement the Executive Director misquoted herself to insert the newly revised version of the statistics on which she now relied.See AF 06.

Issues. The issue is whether the CO correctly found the Employer's description of the position offered to require a combination of duties and/or a foreign language requirement that was as restrictive under the Act and regulations. 20 CFR §§ 656.21(b)(2)(i)(c) and 656.21(b)(2)(ii) provide that the request for alien labor certification be denied unless the Employer sustains its burden of proving its combined duties and its foreign language requirement are customary or business necessities.

Evidence and burden of proof. Employer's rebuttal and brief clearly indicated that it was aware of the criteria to follow in proving the business necessity of its foreign language requirement under **Information Industries, Inc.**, 88 INA 082(Jan. 13, 1988)(*en banc*). Employer was required document its allegations that it could not afford to hire two workers for the combined duties it set out in the job description. **Wang Westland Industrial Corp.**, 88 INA 027 (Mar. 3, 1989)(*en banc*). As the CO explained, the Employer's evidence must establish the infeasibility of such reasonable alternatives as part time workers, new equipment, or business reorganization to accomplish the combined duties. **Robert L. Lippert Theatres**, 88 INA 433 (May 30, 1990)(*en banc*); **Gencorp**, 87 INA 659 (Jan. 13, 1988)(*en banc*).

It is appropriate to observe that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants:

> "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ."[8]

As the Employer seeks certification for the Alien pursuant to an exception to the Act's broad limits on immigration into the United States, the award of alien labor certification is strictly construed under the well-established principle that statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption. See 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). For these reasons, in applying for certification, the Employer and not the CO must carry the burden of proving all of the issues arising under its application for

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[8]The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

relief.

Review. On review the Panel found that the evidence supported the CO's finding that the position offered in Employer's application incorporated a combination of duties that exceeded those described in the DOT for a stock supervisor. Employer was required to show (1) that it was offering permanent, full time employment to which U. S. workers could be referred, (2) that it was customary and normal to hire a stock supervisor to perform the combination of duties it described, or that the combination of duties was a business necessity, and (3) that its language requirement either was customary and normal for a stock supervisor or was a business necessity.

The Panel agrees with the CO's conclusion that the Employer did not sustain its burden of proving the existence of a full time position, based on its admission that it operated its business successfully with a stock supervisor who was a part time employee for several years. The panel will not address the combination of duties of a stock supervisor
with the duties of a "Coordinator, Volunteer Services," "Commissary Manager," "Manager, Distribution Warehouse," and "Manager, Retail Store," as this was not preserved as an issue in the Final Determination. As the Employer rebutted the NOF of the CO with nothing more than the unsupported assertions of its Executive Director, the Panel observes that an employer's unsupported assertion that a job requirement is normal for the industry is insufficient to prove its business necessity. **Watkins-Johnson Company,** 93 INA 544 (April 10, 1993). Moreover, the Employer failed to provide persuasive evidence to substantiate its claims that the duties specified in Item 13 of Form ETA 750A were required to perform the work of a stock supervisor, or that the combination of duties and the foreign language requirement in Employer's application was customary and normal for a stock supervisor.
The evidence of the facts relating to the existence of a position and the combination of duties was found in the statement of the Executive Director and the attached documentation.

As mentioned above, the rebuttal relied on annualized charges relating to the existence of an entity that the Employer claimed to operate year 'round in 1995-1996 year. Although the Employer said its operating enterprise was the store for the resale of contributed merchandise to the needy persons, examination of the supporting documentation revealed that the Employer is a corporate entity named Unity Shoppe, Inc., while the year 'round expenses and employee wages were incurred and paid by the Santa Barbara Council of Christmas Cheer, Inc. As the record does not suggest or establish the contrary, it is inferred that the wages for the services of the worker in the position offered will be paid by the applicant, based on the Form ETA 750A filed as its application. The Employer did not explain how it would pay the person hired or how that worker would be given the intercorporate authority to supervise employees of the Santa Barbara Council of Christmas Cheer, Inc. The documents attached to Employer's rebuttal demonstrate that the Santa Barbara Council of Christmas Cheer, Inc., has the staff and the capacity to pay the wages offered, while Unity Shoppe, Inc., has neither a staff nor a year 'round income to support Employer's proof of the existence of a *bona fide* job under 20 CFR § 656.3.

The evidence in the state and federal tax returns established that the Santa Barbara

Council of Christmas Cheer, Inc., had employees to supervise for two consecutive quarterly periods in 1995-1996. This evidence was not sufficient to prove that either the either the filing corporation, the Santa Barbara Council of Christmas Cheer, Inc., or Unity Shoppe, Inc., maintained a staff for more than the six month period the tax records showed. As this did not demonstrate a historical pattern of any kind of employment whatsoever, the evidence of record did not prove the existence of a year 'round job under 20 CFR § 656.3. This was presented with the Employer's admission that after 1994 the work of its stock supervisor was performed by various incumbents as a part time job, even though it was not entirely satisfied with the individuals that it hired for the job.

Finally, the Executive Director's unsupported statement was the only evidence of the business necessity of the foreign language requirement. The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) the use of that foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. This is demonstrated with proof as to the customers, co-workers, or contractors who speak the foreign language and the percentage of the employer's business that involves that language. In the context of the instant case, the second prong invites evidence that the employee communicates or reads in the foreign language while performing the job duties.

Business necessity is not proven under the first prong where the percentage of customers who speak the foreign language is small. **Felician College**, 87 INA 553 (May 12, 1989)(*en banc*). That share of employer's affected business must equal a percentage that is significant. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991). In **Washington International Consulting Group**, 87 INA 625 (Jun. 3, 1988), however, the Board held that a foreign language was not a necessity where only twenty-three per cent of the client base was affected by the employer's foreign language requirement. Both prongs of the **Information Industries** test must be met, however. Nevertheless, simply proving that a significant percentage of the employer's customers speaks the foreign language is not sufficient to establish business necessity, unless the employer also proves the existence of a relationship between the customers' use of that foreign language and the job to be performed. In **Coker's Pedigree Seed Co.**, 88 INA 048 (Apr. 19, 1989)(*en banc*), and in **Hidalgo Truck Parts, Inc.**, *supra*, business necessity was established by evidence of significant customer dependence on Spanish-speaking employees. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), where the employer did show that a significant percentage of its clientele spoke the foreign language, the Board found that business necessity was not proven because there was no relationship proven between the customers' use of the foreign language and the job to be performed.

The above cited precedents guided the Panel's review of the CO's reasoning in the instant case. The CO was not persuaded because the Employer's arguments as to the business necessity for a stock supervisor who was fluent in Spanish turned entirely on facts that were unsupported by the objective evidence of significant customer dependence on Spanish-speaking employees. **Hidalgo Truck Parts, Inc.**, *supra*. Employer's claims of significant customer dependence on Spanish-speaking employees, which were unsupported by any evidence, were themselves based on an alleged survey that was too old to be relevant or credible under the circumstances presented by this case. Even if its survey was demonstrated to be credible, it would merit little weight because Employer failed to demonstrate that the conclusions its data suggested in 1975 were relevant to the demographic patterns that existed twenty years later when the Employer filed this application. As the Employer's statement failed to show that it could not engage in its usual business unless this employee was fluent in Spanish, it did not demonstrate the business necessity of this job requirement.

On review the Panel found that the evidence supported the CO's finding that the position offered in Employer's application incorporated a combination of duties that exceeded those described in the DOT for a stock supervisor. Employer was required to show (1) that it was offering permanent, full time employment to which U. S. workers could be referred, (2) that it was customary and normal to hire a stock supervisor to perform the combination of duties it described, or that the combination of duties was a business necessity, and (3) that its language requirement either was customary and normal for a stock supervisor or was a business necessity.

Summary. The NOF provided sufficient notice of the reasons for the denial of certification, and told the Employer how to cure the defects found in the application. Employer offered to rebut the CO's findings by a narrative statement that was not supported by the documentation specified in the NOF as to either of the restrictive requirements. In spite of the detailed directions set out in the NOF, Employer's rebuttal neither submitted the documentary proof required nor amended or reduced to the normal qualifications level the job requirements for this position that the CO identified as unlawfully restrictive under the Act and regulations. As the evidence of record supported the CO's denial of labor certification under the Act and regulations, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.